

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

75-5005

To be argued by
SAMUEL J. WARMS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Case No. 75-5005

In the Matter

—of—

AVIEN, INC.,

Debtor.

THE CITY OF NEW YORK,

—against—

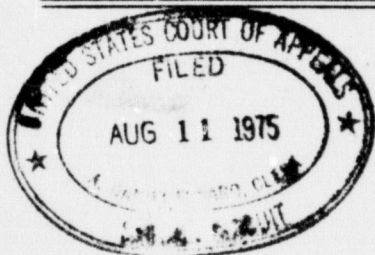
AVIEN, INC.,

Appellant,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX

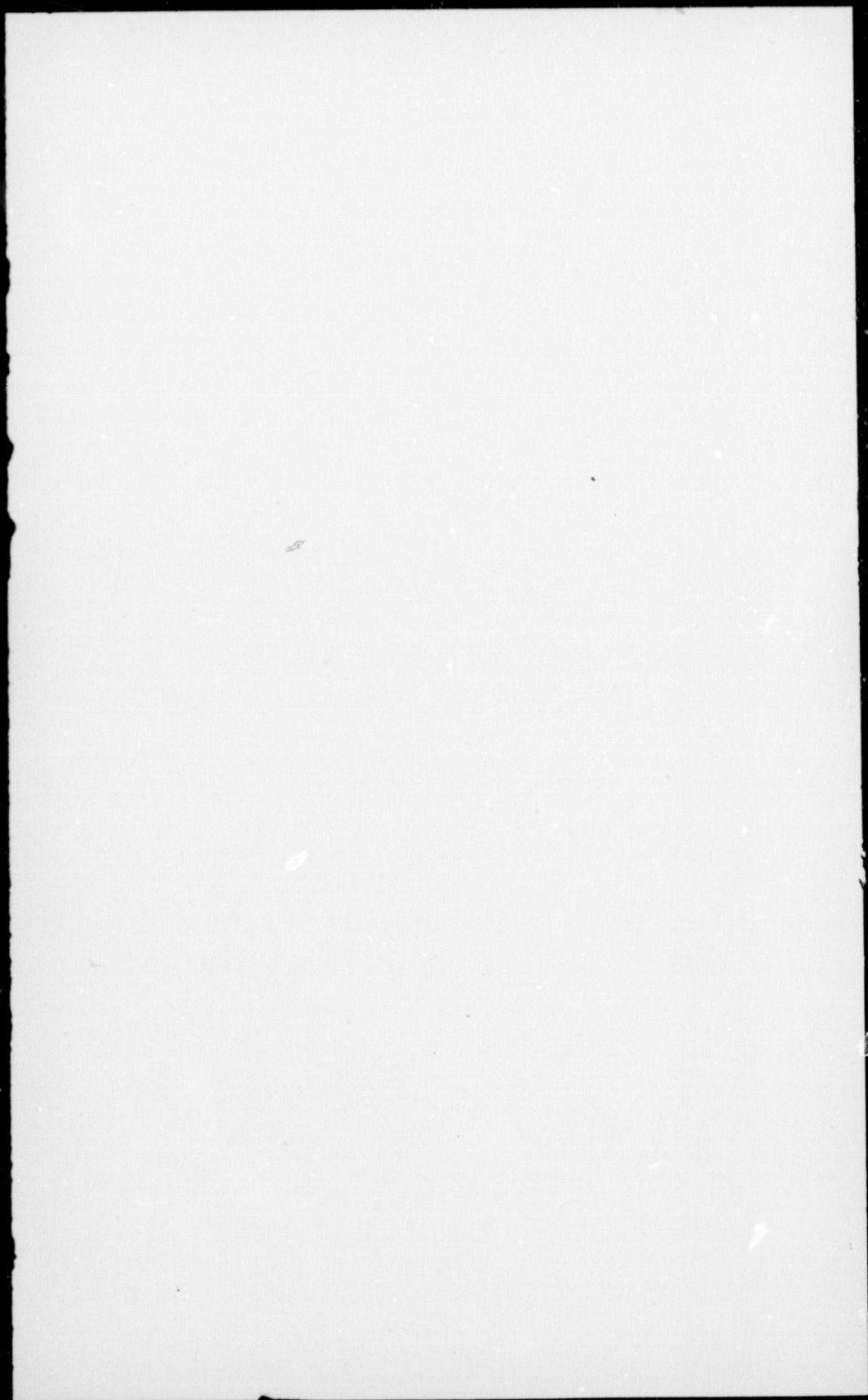


W. BERNARD RICHLAND,
Corporation Counsel,
Attorney for Appellant,
The City of New York,
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New York, New York 10007.
Telephone No. 566-3327

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Relevant Docket Entries

DATE

PROCEEDINGS

Bankruptcy Court

- 12/24/70 Debtor's Petition, Statement of Assets & Liabilities, Statement of Executory Contracts, Corporate Resolution, Affidavit pursuant to Rule XI-2(b) filed and referred to Hon. Sherman D. Warner, Referee. (Orig. & copy sent to Ref. Warner)
- 7/ 3/73 Motion of dtr to expunge, transfer & classify clms as set forth. RET 7/24/73, 10:30 a.m.
- 7/24/73 10:30 a.m. Adj obj of dtr to cl #188—James Talcott Inc. 8-9-73 & adj motion of dtr fd 7/6/73 to reclassify clms. Both adjd 8/14/73, a.m. Adj conf hearing. Adj 8/14/73, a.m.
- 8/14/73 10:30 a.m. Adj Conf Hearing; Adj motion of dtr fd 7/6/73 to expunge & classify clms (1); Hearing on application of atty Cred Comm (1) to adjudge dtr a bkpt or to dismiss & (2) to satisfy court that provisions of 366 have been complied with. *ALL ADJ 9/18/73, a.m. \$15,000.00 to be deposited for conf. on or before 9/18/73.*
- 9/18/73 10:30 a.m. OSC of dtr v. JULES W. WERTHEIMER to restrain dtr from proceeding with action in Civil Court of CNY. Motion granted. Settled in Cert. Adj Conf Hearing; Adj motion to expgr & classify clams (2). Adj Hearing on application of a/cr ettee (R. Herzog) to adjudge

Relevant Docket Entries

DATE

PROCEEDINGS

dtr a bkpt or to dismiss or to satisfy court, etc.
(fd 7/26/73) ALL ADJ 10/9/73, a.m.

- 10/ 9/73 10:30 a.m. Adj. Conf. Hearing adj. to 11/8/73.
Adj. motion of dtr f. 7/6/73 to expunge & re-
classify claims (3) Claim 138, 104 are *adj. to*
11/8/73; Claim 175's obj. withdrawn; Claim 192,
172, 173 motion granted on default—submit or-
der; Claim 177 reduced by 50% \$8,515.45 motion
granted submit order; Adj. Hearing on Appli-
cation of atty/creds. comm. (R. Herzog) to ad-
judge dbtr a bkpt or that provisions of #366
have been complied with is withdrawn (8).
- 11/ 8/73 10:30 a.m. Adj. Motion of dtr f 7/6/73 to ex-
punge and reclassify claims #138, 104 (4), Adj.
Conf Hearing, ALL ADJ to 12/11/73
- 12/11/73 10:30 a.m. Adj motion of dr fd 7/6/73 to re-
classify & expunge Claims 138, 104 (5), Adj
Conf Hearing (Letter of 11/5/73 from Morris
Sheinberg & Co.), ALL ADJ 1/22/74
- 1/22/74 10:30 a.m. Adj motion of dr fd 7/6/73 to re-
classify & expunge claims 138 & 104 (Claim 195
—City of NY amended order suspending above
claim, Adj Confirmation Hearing, *ALL AD-
JOURNED TO 2/5/74*
- 2/ 5/74 10:30 a.m. Adj Motion of dtr fd 7/6/73 to re-
classify & expunge claims 138 & 104 (Claim 195
City of NY amended order suspending above
claim), Adj Confirmation Hearing, *ALL ADJ
TO 2/19/74 at 10:30 a.m.*

Relevant Docket Entries

DATE

PROCEEDINGS

- 2/19/74 Adj Motion of dtr fd 7/6/73 to reclassify & expunge claim 138 & 104, Claim 195—CNY amended order suspending above claim, Adj Confirmation Hearing, ALL ADJ TO 3/19/74
- 3/19/74 10:30 a.m. Adj Motion of dtr fd 7/6/73 to reclassify & expunge claims 138 & 104, Claim 195—CNY amended order suspending above claim, Adj Confirmation Hearing, all adjourned to 4/23/74
- 4/23/74 10:30 a.m. Adj Motion of dtr fd 7/6/73 to reclassify & expunge claims 138 & 104, Claim 195—CNY amended order suspending above claim, Adj Confirmation Hearing, all adj to 5/21/74.
- 5/21/74 10:30 a.m. Adj Confirmation Hearing, Adj Motion of dtr fd 7/6/73 to reclassify & expunge claims 138 & 104, Claim 195—CNY amended order suspending above claim, adj to 6/27/74.
- 6/18/74 Decision filed expunging cl #195 of City of N.Y. for \$17,789.32. Copy to a/dr & N.Y.C.
- 6/27/74 10:30 a.m. Adj Motion of dtr fd 7/6/73 to reclassify & expunge claims 138 & 104, 138 (decided), Adj Confirmation Hearing is adj to 7/25/74.
- 7/10/74 Notice of Appeal to District Court filed by Adrian P. Burke of Corporation Counsel of City of New York entered July 10, 1974. (\$10.00 recd & disb)

Relevant Docket Entries

DATE

PROCEEDINGS

- 7/19/74 Designation of record of issues on appeal filed by City of NY (Corp. Counsel). Copy sent by NYC to a/dtr
- 8/19/74 Notice of Appeal sent to EDNY, Bklyn, together with designations specified. Notice of mailing to Clerk, USDC, Bklyn, a/appellant, a/dtr.

District Court

- 8/20/74 Notice of Appeal to District Court by City of New York from order of Parente, B.J. dated 7/2/74 filed. ASSIGNED TO NEAHER, J.
- 8/22/74 Brief of Appellant, City of New York, filed.
- 8/22/74 By Neaheer, J.—Memorandum order filed that hearing on appeal is scheduled for Oct. 11, 1974 at 2:00 P.M. Briefs are to be served as provided in Bank. Rule 808, but are to be filed with the Court no later than Sept. 30, 1974. So ordered. (cps. mailed to Elias Mann, Esq. 225 Bway, NYC and Adrian P. Burke, Esq. Corp. C. of City of NY Municipal Bldg., NYC)
- 11/15/74 Before Neaheer, J.—Bankruptcy hearing adjd. to January 24, 1975 at 10:00 A.M.
- 11/18/74 Stipulation to correct errors re: stipulation of facts dated Dec. 18/73 and to reschedule argument on appeal from 11/15/74 at 2:00 P.M. for Jan. 24, 1975 at 2:00 P.M. etc. filed.

Relevant Docket Entries

DATE

PROCEEDINGS

- 11/19/74 By Neaher, J.—Above stipulation so ordered.
- 12/31/74 By Neaher, J.—Order filed re: Stipulation dated 12/23/74 that the argument of appeal scheduled for 1/24/74 at 2:00 P.M. is extended to & including 1/24/74 at 2:00 P.M. Time of appellee to serve answering brief extended to 1/17/75. Appellant, City of N.Y., shall have until 2/10/74 to serve and reply or post trial memo.
- 1/24/75 Before Neaher, J.—Bankruptcy Hearing on order and stipulation to reschedule argument on appeal from 11/15/74 to Jan. 24, 1975 at 2:00 P.M., etc. Case Called—Hearing held and concluded. Court Reserved Decision.
- 3/10/75 By Neaher, J.—Opinion filed. re: appeal by the City of N.Y. If the City questioned the accuracy of the figures reported on the Federal returns the burden of at least so indicating was on the City, particularly in view of the fact that the City itself audited Avien's books & record for the periods in question. Accordingly, the decision of the bankruptcy judge expunging the City's claim for general corporation tax is affirmed. SO ORDERED. (copies mailed to Levin & Weintraub, Esqs., W. Bernard Richland, Esq. Corp. Couns. of City of N.Y.) Copy sent to each BJ—3/12/75 HC
- 4/ 7/75 Notice of Appeal filed from above order by Corp. Counsel for the City of New York. (JN—) copy sent to U.S.C.C.A. HC

Debtor's Notice of Motion

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

In Proceeding for an Arrangement

No. 70 B 1085

In the Matter of

AVIEN, INC.,

Debtor.

S I R S :

PLEASE TAKE NOTICE that upon the annexed Petition of the Debtor, the undersigned will move this Court before the Honorable C. Albert Parente, Referee In Bankruptcy, at the Courthouse, 90-04—161st Street, Jamaica, New York on the 24th day of July 1973, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as Counsel can be heard, for an Order Expunging, Transferring and Classifying the claims set forth in the annexed Petition, and for such other and further relief as is just.

7a

Debtor's Notice of Motion

Dated: Jamaica, New York
July 3, 1973

Yours, etc.

LEVIN & WEINTRAUB

Attorneys for Debtor

Office & P. O. Address

255 Broadway

New York, New York 10007

(212) 964-0033

To:

RESPONDENTS NAMED IN
THE ANNEXED PETITION

Petition

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

*To the Honorable C. Albert Parente,
Referee in These Proceedings:*

The petition of the debtor in possession respectfully shows and alleges:

1. Heretofore debtor filed a petition for arrangement under Chapter XI, S322 of the Bankruptcy Act with the clerk of this court and was thereafter continued in the operation and management of its business and property as debtor in possession pursuant to order of this Court.

2. The debtor objects to the following claims on the grounds that they are duplicates. The debtor therefore respectfully requests that said claims be expunged in accordance with the following schedule:

<i>Claim No.</i>	<i>Name and Address of Claimant</i>	<i>Amount Filed</i>	<i>Duplicate of</i>
86	NYS Department of Labor Albany, NY 12626	\$ 4,619.02	50
105	NYC Excise Tax Bureau 139 Centre Street New York, NY 10007	2,530.00	138

Petition

3. The debtor objects to the claims set forth in the following schedule on the grounds that these claims are obligations of Davis-Edwards Pharmacal Corp., which corporation has filed a Chapter XI proceeding number 70 B 1086 and was adjudicated on April 14, 1972. Petitioner respectfully requests that the claims set forth in the following schedule be transferred to the Davis-Edwards Pharmacal Corp. proceeding and be expunged against Avien, Inc.:

<i>Claim No.</i>	<i>Name and Address</i>	<i>Amount Filed</i>
70	Industrial Trucks, Inc. c/o Richard Braverman Esq. 261 Broadway New York, NY 10007	\$11,020.17
90	E. J. Kelley Co. 30 Railroad Square Torrington, Conn. 06790	5.20
192	R. A. Weaver, Jr., & Associates 45 Rue de Livourne Brussels, Belgium	8,078.20

4. Claim #29 in the amount of \$60.16, filed by William Hird & Co., 1318 76 Street, Brooklyn, N.Y. 11228 is filed as a priority claim. Petitioner objects to the priority status of this claim and respectfully requests that the claim be transferred to a general claim.

5. The debtor objects to the claims set forth in the following schedule on the grounds set forth therein. Petitioner respectfully requests that said claims be expunged:

Petition

<i>Claim No.</i>	<i>Name and Address</i>	<i>Amount Filed</i>
104	Morris Sheinberg & Co. c/o Levin & Weintraub, Esq. 225 Broadway New York, NY 10007 Services not rendered.	\$ 2,500.00
121	Stanley Benerofe 5 Charles Lane Port Chester, NY 10573 Improper expense reporting.	\$ 1,727.49
162	DCASR-NY c/o U.S. Attorney Eastern District 225 Cadman Plaza East Brooklyn, NY Debt has been liquidated.	\$325,994.63

6. The debtor objects to part of the claims as set forth in the following schedule on the grounds set forth therein. Petitioner respectfully requests that only allowable amounts be accepted:

<i>Claim No.</i>	<i>Name & Address</i>	<i>Amount Filed</i>	<i>Allowable Amt.</i>
7	Edward Nathan 136 East 57 St. New York, NY Notes are non-interest bearing.	\$ 4,600.00	\$ 4,000.00

Petition

<i>Claim No.</i>	<i>Name & Address</i>	<i>Amount Filed</i>	<i>Allowable Amt.</i>
66	Bekins Van Lines 333 So. Center St. Hillside, Ill.	\$ 533.45	\$ 433.45
	Payment in the amount of \$100.00 made Nov. 23, 1970.		
24	Gladding Keystone Corp. 179 River St. Oneonta, NY 13820	9,232.70	8,472.25
	Claim includes work-in-process subsequently delivered and paid for.		
85	Oakite Products c/o Robert P. Herzog and Jules Teitelbaum 2 Park Ave., NYC 10016	530.84	430.84
	Payment in the amount of \$100.00 made November 23, 1970.		
93	Benjamin A. Cook c/o Bowditch, Gowetz & Lane, Esqs. 340 Main St. Worcester, Mass. 01608	28,750.00	25,750.00
	Claim exceeds amount payable.		

Petition

<i>Claim No.</i>	<i>Name & Address</i>	<i>Amount Filed</i>	<i>Allowable Amt.</i>
94	Rachel C. Lowe c/o Bowditch, Gowetz & Lane, Esqs. 340 Main St. Worcester, Mass. 06108 Claim exceeds amount payable.	\$28,750.00	\$25,750.00
122	Texas Instruments Supply Co. 6000 Denton Dr. Dallas, Texas 75235 Claim includes materials de- livered subsequent to Dec. 24, 1970 and paid for.	499.00	49.40
139	E.S. Metal Products Co. 1723 8th Ave. Brooklyn, N.Y. 11215 Claim does not reflect \$1000.00 payment on November 21, 1970 or Debit Memos for re- turned merchandise.	3,701.28	2,560.86
158	Pfizer, Inc. c/o Rosen, Herzog & Teitlebaum, Esqs. 2 Park Ave. New York, N.Y. 10016 Claim in excess of amount of guarantee.	78,044.08	61,820.11

Petition

<i>Claim</i>		<i>Amount</i>	<i>Allowable</i>
<i>No.</i>	<i>Name & Address</i>	<i>Filed</i>	<i>Amt.</i>
175	Versailles Management Corp. 450 7th Ave. New York, N.Y. \$2,000.00 payment not reflected.	\$11,639.76	\$ 9,639.76
138	City of N.Y.— Finance Adm. 139 Centre St. New York, N.Y. 10007 Claim includes Commercial Rent Tax which has been paid.	4,000.00	2,900.00

WHEREFORE, petitioner respectfully prays for the relief herein requested and for such other and further relief as is just.

Dated: New York, New York
June 22, 1973

AVIEN, INC.

Debtor in Possession

By: /s/ LEO A. WEISS

Leo A. Weiss, *President*

LEVIN & WEINTRAUB

By: /s/ ELIAS MANN
A Partner

**City's Second Amended Proof of Claim
(Numbered 195)**

B-202 10/72

THE CITY OF NEW YORK
FINANCE ADMINISTRATION
DEPARTMENT OF TAX COLLECTION
139 Centre Street
New York, N.Y. 10013

PROOF OF CLAIM

2ND AMENDED
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Reg. No. Q 90490-4, 4-90490-6
Empl. Ident. No. 11-1718293
Claim No. 50456
Docket No. 70B1085
File with:

HON. SHERMAN D. WARNER, *Referee*
92-32 Union Hall Street
Jamaica, New York 11433

FILED

AUG. 21, 1973

C. ALBERT PARENTE

Referee in Bankruptcy

195 claim reduced to 1,777.84
per order fd 7/2/74

City's Second Amended Proof of Claim

IN THE MATTER OF

AVIEN INC.

58-15 Northern Boulevard
Woodside, New York

Debtor

DANIEL B. ILGNER of the County of New York, State of New York, says:

1. That he is the Acting Asst. Chief in charge of the Audit Division of the Finance Administration of The City of New York, a municipal corporation of the State of New York and is duly authorized to make this proof of claim on its behalf,

2. That debtor, Avien Inc. the above-named was at and before the filing by or against him of the petition and still is, justly and truly indebted or liable to this corporation in the sum of \$19,567.16 Dollars.

3. That the consideration of this debt or liability is as follows:

A schedule is attached hereto and made part hereof as if set forth in full.

4. That no part of the debt or liability has been paid, except

5. That there are no set-offs or counterclaims to the debt or liability, except

6. That the corporation does not hold, and has not, nor has any person by its order, or to the knowledge or belief

City's Second Amended Proof of Claim

of the undersigned, for its use, had or received, any security or securities for the debt or liability except

7. That no note or other negotiable instrument has been received for such account or liability or any part thereof; and that no judgment has been rendered thereon, except that a warrant or warrants for excise taxes were filed against the bankrupt as indicated on the attached schedule. See Par. 10 below.

8. That demand is hereby made that the aforesaid claim be allowed and paid in full as a priority claim in advance of any distribution to creditors; and furthermore, that the said claim be entitled to the rights of a lien claimant pursuant to the provisions of the Administrative Code of the City of New York and the Bankruptcy Act.

9. That the said corporation, by its duly constituted authorities, has duly made the assessment set forth herein by way of proof of claim pursuant to the provisions of the Administrative Code of the City of New York enacted for the collection of taxes set forth herein.

10. That in accordance with subd. b of section 67 of the Bankruptcy Act the said corporation hereby perfects the lien of the warrant or warrants referred to in par. 7 hereof by filing this notice with the court.

Date at New York, N.Y. Aug 17 1973

DANIEL B. ILGNER
Acting, Asst. Chief, Audit Div.

City's Second Amended Proof of Claim

Penalty For Presenting Fraudulent Claims.—Fine of not more than \$5,000 or imprisonment for not more than five years, or both—Title 18, U. S. C., § 152

PLEASE MAKE CHECKS PAYABLE TO CITY COLLECTOR

Schedule of Taxes due by debtor as at the date of filing of the petition based on ☐ returns filed, ☐ external indices ☐ audit. The City of New York by its duly constituted authorities, hereby determines the amount of tax due as set forth hereinbelow.

TYPE OF TAX	PERIOD	TAX DEFICIENCY		
		Pursuant to Chapter 46 of the Administrative Code of the City of New York		
		PRINCIPAL	INT.-PEN.	TOTAL
Commercial Rent or Occupancy Tax	12/1/67- 5/31/70	—0—	—0—	—0—
Commercial Rent or Occupancy Tax 58-15 No. Blvd. Queens, New York	6/1/70-12/31/70	29.86	—0—	29.86
N.Y.C. General Corporation Tax	1/1/66- 6/30/70	15,770.78	2,018.54	17,789.32
N.Y.C. Income and/or Earnings Tax Withheld	9/1/66-12/24/70	1,747.98	—0—	1,747.98
(This Schedule Consists of		Pages)		
TOTALS DUE (See Note)		17,548.62	2,018.54	19,567.16

* Indicates tax deficiency under Section 6 of the Business Tax Law, Section 7 of the Sales Tax Law, Section 8 of the Commercial Rent or Occupancy Tax Law, Section 62 of the N.Y.C. Corporation Tax Law, Section 61 of the N.Y.C. Personal Income Tax Law, Section 31 of the N.Y.C. Earnings Tax on Non-residents Law and/or Section 25 of the N.Y.C. Unincorporated Business Tax Law.

Together with additional interest for the period from the date of this proof of claim to the payment thereof, on the principal amounts stated in claim at the rates permitted by law.

Transcript of Hearing on Debtor's Motion

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN BANKRUPTCY

No. 70-B-1085

[CAPTION OMITTED]

Jamaica, Long Island, New York,
February 5, 1974,
At 12:15 o'clock p.m.

Before:

HON. C. ALBERT PARENTE,
Bankruptcy Judge.

ADJOURNED RULE XI-4 HEARING
ADJOURNED CONFIRMATION HEARING
PROCEEDED PURSUANT TO ADJOURNMENT

HEARING ON MOTION OF DEBTOR FILED JULY 6, 1973
TO RECLASSIFY AND EXPUNGE CLAIMS NUMBERS
104 AND 138 AND 195

PROCEEDED PURSUANT TO NOTICE

Appearances:

LEVIN & WEINTRAUB, Esqs.,
Attorneys for the Debtor,
225 Broadway
New York, New York

By: ELIAS MANN, Esq., of Counsel.

Opening Statements

WILLIAM H. BISNOFF, Esq.,
General Counsel for the Debtor,
 58-15 Northern Boulevard
 Woodside, Long Island, New York

MR. STEPHEN I. WEISS,
Controller of the Debtor,
 35 Cantiague Lane
 Westbury, Long Island, New York

MURRAY GINGOLD, Esq.,
Assistant Corporation Counsel
for the City of New York,
 Municipal Building
 New York, New York.

RAYMOND HERZOG, Esq.,
Assistant Corporation Counsel
for the City of New York,
 Municipal Building
 New York, New York.

Mr. Mann: May it please the Court, this is a proceeding which was instituted by the Debtor objecting to the claim of the City of New York which was filed in these proceedings. We have stipulated as to some of the facts with the corporation counsel of the City of New York—

The Court: (Interposing) With which claim are we concerned now?

Mr. Mann: We are now concerned with claim number 195 filed by the City of New York, which I believe is in the amount of \$19,567.16.

Opening Statements

The Court: Which notice of motion is that? Will you give me that date, please?

Mr. Mann: I do not have a copy of the notice of motion here with me today, Your Honor. Do you have a copy of that notice of motion, Mr. Gingold?

Mr. Gingold: Yes, I have (handing papers to Mr. Mann).

Mr. Mann: If I may, Your Honor, we originally instituted a proceeding by way of notice of motion dated July 3, 1973, which was returnable on July 24, 1973, objecting to claim number 105 of the City of New York in the sum of \$2,530.00.

The Court: And that one I have, yes.

Mr. Mann: As a result of that motion the City went in and made an audit, and they then came back and filed an amended claim which is claim number 195. That claim is for the sum of \$19,567.16.

Mr. Gingold: I would like to correct that, if Your Honor please. It was first filed for \$2,500.00, and then it was amended to the sum of \$4,000.00, and then there was a second amended claim filed for \$19,567.16.

Mr. Mann: And I think the objection is actually addressed to the amended claim number 195 for \$19,567.16.

The Court: Where are all of the papers in support of that?

Mr. Gingold: I believe, Your Honor, that there has been no formal objection made to the second amended claim number 195 of the City of New York, but the City would be willing to stipulate that the claim in the notice of motion was deemed objected to.

Mr. Mann: And we are objecting to the amended claim filed by the City of New York, which is claim number 195, if Your Honor please.

Opening Statements

The Court: What happened to the objection to the claim number 105?

Mr. Mann: The two previous claims as a result of the filing of the second amended claim number 195 now fall. So that all we are left with at the present time is claim number 195, Your Honor.

The Court: Then, put it in the form of a motion, and stipulate to it on the record so that we have a complete picture here.

Mr. Mann: Yes, Your Honor. The Debtor now moves to amend its notice of motion dated July 3, 1975 so as to object to claim number 195 of the City of New York filed in the sum of \$19,567.16.

Mr. Gingold: And the City consents to that motion, if Your Honor please.

Mr. Mann: And it is further stipulated of course, that the prior claims numbers 105 and 138 are withdrawn which were filed by the City of New York.

Mr. Gingold: That is consented to, Your Honor.

The Court: Then, it is so ordered.

Mr. Mann: Now, we have a stipulation of facts, Your Honor, which the City of New York and my office entered into as to some of the facts which we think will reduce the trial of this action.

So, for the purposes of the record I would like to read them, and then submit the stipulation to Your Honor.

The Court: Very well, then.

Mr. Mann: It is hereby stipulated by the attorneys for the respective parties that the following are the undisputed facts in connection with the Debtor's motion to reduce claim number 195 of the City of New York:

Opening Statements

(1) On December 24, 1970 the Debtor filed its petition for an arrangement under Chapter XI of the Bankruptcy Act, and thereafter was continued in the operation of its business.

(2) The Debtor's respective United States Corporation tax returns showed taxable incomes or losses as follows: For the fiscal year ending June 30th, 1963 there was a loss of \$762,423.73; for the fiscal year ending June 27, 1965 there was a loss of \$156,856.34; for the fiscal year ending July 3, 1966 there was a loss of \$993,529.48, and for the fiscal year ending June 30th, 1968 there was taxable income of \$282,598.52.

(3) The Debtor's City of New York general corporation tax report for the fiscal year ending June 30th, 1968 showed a net income of \$286,969.82 before net operating loss. The Debtor's federal tax return for the same tax year showed a net operating loss deduction of \$1,893,063.73 comprised of the following carry-forward losses: For the year ending June 30th, 1963, \$742,677.94; for the year ending June 30th, 1965, \$156,856.34, and for the year ended June 30th, 1966, \$993,529.48.

Now, Paragraphs numbers 4 and 5 of the stipulation I need not repeat because it is not important. It relates to the two former claims which were filed by the City of New York, since they were amended by a later claim.

Also, Paragraph number 6 relates to a former claim that was filed by the City of New York, which is immaterial, also.

Opening Statements

Paragraph 7 refers to the actual claim filed here, which consists of three items. The total claim is for \$19,567.16, and it gives a breakdown of that claim. The commercial rent as alleged in the claim is \$29.86; the general corporation tax is \$17,789.32, and the withholding tax is \$1,747.98, or a total of \$19,567.16.

(8) The portion of claim number 195 representing general corporation tax is for an amount which allegedly accrued in the fiscal year ending June 30th, 1968, which includes interest and penalties of a little over \$2,000.00 as a result of the disallowance of the loss carry-forward.

(9) The Debtor does not dispute its liability as set forth above for the commercial rent tax and withholding taxes, which amount to approximately \$1,770.00, and the dispute resolves itself around the claim number 195 filed by the City of New York.

The Court: Was the loss carry-forward approved by the federal government?

Mr. Mann: Yes, Your Honor. The loss carry-forward was approved by the federal government, but that is not the issue here. If I may, Your Honor, there are certain other things which I must offer into evidence, and then I will be able to argue the law after the City gets through with its case.

The Court: Are you offering this stipulation into evidence?

Mr. Mann: Yes, Your Honor. I am offering this stipulation into evidence, yes.

The Court: You may.

Stephen I. Weiss—for Debtor—Direct

Mr. Mann: I offer in evidence as Debtor's Exhibit 1, a stipulation of facts with the City of New York, dated December 18, 1973.

Mr. Gingold: No objection, if Your Honor pleases.

The Court: Mark it.

(Stipulation of facts between Avien, Inc. and the City of New York, dated December 18, 1973, referred to above, received in evidence and marked Debtor's Exhibit 1, 2-5-74, J.J.Y.)

Mr. Mann: Mr. Weiss, would you take the stand, please?

STEPHEN I. WEISS, residing at 35 Cantiague Lane, Westbury, Long Island, New York, called as a witness in behalf of the Debtor, being first duly sworn by the Bankruptcy Judge, testified as follows:

Direct Examination by Mr. Mann:

Q. Mr. Weiss, are you employed by the debtor corporation? A. I am.

Q. In what capacity are you so employed? A. As controller.

Q. And how long have you been employed by the debtor corporation? A. For over 12 years.

Q. In what capacity? A. As junior accountant and as senior accountant and then controller.

Q. And how long have you been the controller for the company? A. For approximately nine years.

Q. And what are your duties as controller? A. General supervision of the books and records of the corporation,

Stephen I. Weiss—for Debtor—Direct

and the preparation of tax returns, and general financial matters.

Q. Are the books and records maintained by this corporation maintained in the usual and ordinary course of business? A. They are.

Q. And are they maintained and controlled under your supervision? A. Yes, they are.

Q. And are the entries made therein made at the time of the transactions? A. Yes, sir.

Q. Mr. Weiss, are you related to Mr. Leo Weiss who is the president of this debtor corporation? A. No, I am not.

The Court: Have you submitted a memorandum of law, Counselor?

Mr. Gingold: Yes, Your Honor. I had submitted a memorandum of law the last time I was here, sir.

The Court: You have?

Mr. Gingold: Yes, sir. I would also like to state at this point that I was just handed a memorandum of law from the Debtor, and I would request time to reply to that.

Mr. Mann: I have no objection to that, if Your Honor pleases.

The Court: Then, that request is granted.

Q. Mr. Weiss, I show you a copy of the United States Corporation income tax return for the period July 1, 1968 and ending June 29, 1969, and ask you whether you recognize this return (handing papers to the witness)? A. Yes, I do.

Q. Can you describe it to us, please? A. I think you have described it already. It is a United States Corporation

Stephen I. Weiss—for Debtor—Direct

tax return for the period beginning July 1, 1968 and ending June 29, 1969.

Q. And was this a copy of the return which was filed with the Director of Internal Revenue? A. Yes, it was.

Mr. Mann: I offer this copy of return in evidence as Debtor's Exhibit 2, if Your Honor pleases.

Mr. Gingold: I am going to object to this, Your Honor, on the ground that the year in issue here is the fiscal year 1967 to 1968, and I do not think this year has any bearing on this matter.

The basis of the City's disallowance was on the fiscal year 1967 to 1968. I cannot understand why this is material or relevant here.

The Court: What period does that cover?

Mr. Gingold: This is for the fiscal year 1968 to 1969, Your Honor.

Mr. Mann: Under the tax law, if Your Honor please, the Debtor has a right to carry-forward or to carry-back certain tax losses which it sustained. This period, Your Honor, as my proof will indicate is a tax loss which we say we are permitted to carry-back under the statute.

Therefore, I think it certainly is germane and certainly it is relevant and material as to the issue here involved.

The Court: The objection is overruled. Mark it in evidence.

(Copy of United States Corporation income tax return filed by Avien, Inc. for the period from July 1, 1968 to June 29, 1969, referred to

Stephen I. Weiss—for Debtor—Direct

above, received in evidence and marked Debtor's Exhibit 2, 2-5-74, J.J.Y.)

Mr. Mann: I merely call your attention Your Honor, to the fact that it shows a loss for that period of \$165,427.60.

The Court: It is so noted.

By Mr. Mann:

Q. Mr. Weiss, I show you a United States Corporation income tax return for the period from June 30, 1969 and ending June 28, 1970, and ask you whether you can identify this tax return (handing papers to the witness)? A. Yes. This is a copy of the Avien, Inc. United States corporation tax return for the period ending June 28, 1970.

Q. And is this a true copy of the return which was filed with the Director of Internal Revenue? A. It is.

Mr. Mann: I offer this return in evidence, if Your Honor please.

Mr. Gingold: I am also going to object to this, Your Honor, on the same ground as I objected to the other income tax return.

The Court: The objection is overruled. Mark it in evidence.

Mr. Gingold: I take an exception, if Your Honor please.

The Court: Mark it.

(Copy of United States corporation income tax return filed by Avien, Inc. for the period from June 30th, 1969 to June 28, 1970, referred to

Stephen I. Weiss—for Debtor—Direct

above, received in evidence and marked Debtor's Exhibit 3, 2-5-74, J.J.Y.)

Mr. Mann: I call Your Honor's attention to the fact that that return shows a loss for the period here in question of \$337,177.85.

The Court: It is so noted.

By Mr. Mann:

Q. Now, Mr. Weiss, for the year 1966, and that is the fiscal year, your income tax return filed with the Director of Internal Revenue showed a loss of \$993,529.48. A. Yes, sir.

Q. And that is for the period from June 28, 1965 to July 3, 1966. A. Yes, sir.

Q. Were you able to make an inspection of the books and records of this corporation to come up with a figure which would indicate the loss which was sustained by the corporation for the period from January 1, 1966 up through and including the July 3, 1966 period? A. Yes, I was.

Q. And what is that figure, Mr. Weiss? A. It is approximately \$125,000.00.

Q. And was that based upon an actual study made by you of the books and records of this corporation? A. A superficial study, and not a rigorous study.

The Court: And is a superficial study sufficient for you to form an opinion of fact?

The Witness: Based upon the records that I was using, yes, Your Honor.

Stephen I. Weiss—for Debtor—Cross

Q. In your opinion would the variation between the figure you have given and the actual loss be substantial? A. No, it would not.

Q. How much would the variation be, if at all, Mr. Weiss?

A. Ten percent to 20 percent, possibly.

Mr. Mann: I have no further evidence to produce, if Your Honor please. The Debtor rests.

The Court: You may cross examine, Counselor.

Cross Examination by Mr. Gingold:

Q. Mr. Weiss, do you prepare the tax returns for Avien, Inc.? A. Yes, I do.

Q. Do you also participate in filing them with the federal government, with the State of New York and with the City of New York? A. When you say "participate" I mail them, yes.

Q. You mail them? A. Yes, sir.

Q. Did you prepare the United States corporation income tax returns for the fiscal year 1967 to 1968 for Avien, Inc.? A. Yes, I did.

Q. I show you this paper, and ask you to identify it (handing paper to the witness)? A. Yes. This is Avien, Inc. New York City general corporation tax report for the fiscal year ended June 30th, 1968.

Q. And did you prepare this paper, Mr. Weiss? A. Yes, I did.

Q. I call your attention to Item number 8, Schedule B, and ask you to tell the Court what that is? A. Item number 8 is 50 percent of the dividend from a non-subsidiary corporation.

Stephen I. Weiss—for Debtor—Cross

Q. Are you reading the correct item there, Mr. Weiss?

A. Yes, I am.

Q. Oh, I am sorry. I mean, item number 9? A. New York City net operating loss deduction, \$282,598.52.

Q. And how did you arrive at that figure? A. That I believe, if I remember correctly, is the same amount as the income on the federal tax return for the same period.

Q. In other words, then, you put down as a net operating loss deduction on the New York City return the same amount as the income or the net income on the federal return; is that correct? A. Yes, that is correct.

Q. How did you arrive at that, Mr. Weiss? A. Again, this is my recollection, but I believe the instructions for the City's return state generally that the amount of net operating loss deduction allowable for the City was the same as for the federal government.

Q. Is this the same net operation loss deduction as was shown on the federal return for the year 1967 to 1968? A. No, it is not.

Q. But you just said that you thought you used the same figure as the net operating loss deduction on the federal return; is that correct? A. As the amount applied towards the income for that year.

Q. Are you familiar with the fact that the net operating loss deduction shown on the federal return must be the same on the City return, Mr. Weiss?

Mr. Mann: I object to that, if Your Honor pleases. That is a conclusion of law.

The Court: Objection overruled.

Mr. Mann: He is equating it equally.

The Court: He is examining him as to whether

Stephen I. Weiss—for Debtor—Cross

he knows if that is the fact or not, and he can answer that "yes" or "no".

The Witness: Would you repeat the question, please?

Mr. Gingold: Will the Court Reporter read it, please?

(Pending question read as above.)

The Court: If you are objecting to the form of the question, I will ask him to rephrase it or I will have him rephrase it.

Mr. Mann: This is what Your Honor must decide today, and the issue here is whether the return must be identical with the United States return, or whether it is permissible to take certain deductions in accordance with the law which the law gives us, if Your Honor please.

The Court: Well, I should have that information from your expert.

Mr. Gingold: Will you repeat the last question again, please, Mr. Reporter?

(Pending question again read as above.)

The Witness: Yes, I am.

By Mr. Gingold:

Q. Was the net operating loss deduction shown on the federal return the same as the net operating loss deduction on the federal return for the same year, Mr. Weiss? A. I am sorry, but would you read that question, please?

Stephen I. Weiss—for Debtor—Cross

The Court: Read it, please, Mr. Reporter.

(Last question read as above.)

Mr. Gingold: I would like to strike that question, then, and rephrase it.

Mr. Mann: I would suggest that if counsel will introduce the 1968 return into evidence, it will then speak for itself.

Mr. Gingold: I am about to do that.

Mr. Mann: Well, then you do not have to ask the witness about that. It will speak for itself. I have no objection to it, Your Honor.

The Court: He did not tell you how to run your case, Mr. Mann.

Mr. Mann: Well, Your Honor, counsel is making a statement which is not even factually correct. He is confusing the deduction with income. If you will look at the 1967 return, you will see that the net operating loss deduction is \$2,800,000.00—

Mr. Gingold: (Interposing) I wish counsel would not testify here, Your Honor.

The Court: This is a problem which arises in the Bankruptcy Court. Counsel is very proper in every aspect except proper decorum.

Now, let him proceed and finish his cross examination, and then you may have your redirect examination of the witness.

Mr. Mann: Your Honor, I have no objection to counsel conducting his own trial, but I do object when he puts questions to a witness which are not factually correct.

Stephen I. Weiss—for Debtor—Cross

The Court: I will pass upon that. All right; you may proceed and continue, Counselor, and do not let the interruption cause you any concern.

Mr. Gingold: Yes, Your Honor.

The Court: You were going to rephrase your question.

Mr. Gingold: Yes, sir.

By Mr. Gingold:

Q. Mr. Weiss, is it your understanding as an accountant in the preparation of income tax returns for Avien, Inc. for the year 1967 to 1968 that the net operating loss deduction shown on the City's return must be the same as the net operating loss deduction shown on the federal return for the same taxable year? A. Yes, in retrospect I know that, but I did not do it on all returns.

Q. You didn't do that on these returns? A. No, not on the 1968 return that is in question here, no.

Q. Is there any reason why you didn't do that? A. As I recall I think the instructions were vague in the instructions to the return to the City.

Q. And you put a deduction down which was already vague in your mind; is that correct?

Mr. Mann: Your Honor, I object to that question.

The Court: Objection sustained. Rephrase your question, Counselor.

Q. In other words, then, in your own mind the deduction that you showed on the City's return was vague in your mind, Mr. Weiss; is that correct?

Stephen I. Weiss—for Debtor—Cross

Mr. Mann: I object to that, if Your Honor please.

The Court: Objection sustained as to form. You are asking for a state of mind, Counselor, which is improper.

Q. You did not, then, have a clear understanding of why you showed a net operating loss deduction on the City's return; is that correct, Mr. Weiss?

Mr. Mann: That is objected to, if Your Honor pleases.

The Court: Objection sustained.

Q. Is it clear to you now that you improperly showed a net operating loss deduction on the City return; is that correct?

Mr. Mann: I object to that, if Your Honor pleases.

The Court: Objection sustained. Now, let us take a five minute recess at this time.

(Whereupon, after a recess the hearing was resumed.)

The Court: Do we have the 1967-1968 federal return here? Is it available?

Mr. Mann: Yes, Your Honor; it is.

The Court: Why has it not been submitted into evidence?

Mr. Gingold: It is going to be submitted into evidence, Your Honor, but I want to first submit the City return at this time.

Stephen I. Weiss—for Debtor—Cross

The Court: Very well, then.

Mr. Gingold: I wish to offer into evidence the original return filed by Avien, Inc. for general corporation taxes for the fiscal year 1967 and ending June 30th, 1968.

The Court: Show it to counsel for the Debtor, please?

Mr. Gingold: Yes, Your Honor (handing papers to Mr. Mann).

Mr. Mann: No objection, if Your Honor please.

Mr. Gingold: In lieu of submitting this original to the Court, this is an original document and it must remain with the finance administration of the City.

Therefore, I would like to offer a true copy of it into evidence, and I ask whether there is any objection to it.

Mr. Mann: No, no objection to it.

The Court: Very well. Then, the copy will be marked in evidence. However, you should check it to see that it corresponds before it is marked, Mr. Mann.

Mr. Mann: Yes, Your Honor.

Mr. Gingold: Here is the original return (handing papers to Mr. Mann).

Mr. Mann: I have a copy of it, also.

(Pause.)

The Court: Does it conform, Mr. Mann?

Mr. Mann: Yes, Your Honor. It does conform, yes.

The Court: Then, mark the copy into evidence.

Stephen I. Weiss—for Debtor—Cross

(Copy of return filed by Avien, Inc. for general corporation taxes with the City of New York for the fiscal year 1967 and ending June 30th, 1968, referred to above, received in evidence and marked Claimant's Exhibit A, 2-5-74, J.J.Y.)

Mr. Gingold: I now call upon the Debtor to produce the United States corporation tax return for the fiscal year 1967-1968.

Mr. Mann: Very well (handing papers to Mr. Gingold).

By Mr. Gingold:

Q. Mr. Weiss, I show you this paper, and ask you to identify it (handing paper to the witness)? A. Yes. This is Avien's, Inc., United States income tax return for the fiscal year ending June 30th, 1968, or a copy thereof.

Mr. Gingold: I offer this copy of the United States corporation income tax return for the fiscal year 1967-1968 into evidence for Avien, Inc.

Mr. Mann: No objection, if Your Honor please. The Court: Mark it.

(Copy of United States corporation income tax return for the fiscal year 1967-1968 filed by Avien, Inc., referred to above, received in evidence and marked Claimant's Exhibit B, 2-5-74, J.J.Y.)

Stephen I. Weiss—for Debtor—Cross

The Court: Gentlemen, at this time I have two inquests in other matters which I will take at this time. So, I would adjourn this instant matter until two o'clock this afternoon.

(Whereupon, at 12:45 o'clock p.m. a luncheon recess was taken until 2:00 o'clock p.m.)

AFTERNOON SESSION

(Hearing resumed after luncheon recess at 2:00 o'clock p.m.)

The Court: You may proceed, gentlemen.

Mr. Gingold: Mr. Weiss, will you resume the stand, please?

STEPHEN I. WEISS, resumed.

Mr. Gingold: If Your Honor please, may I have the exhibits which we have already introduced into evidence?

The Court: You may (handing papers to Mr. Gingold).

Cross Examination by Mr. Gingold (Continued):

Q. Mr. Weiss, are you familiar with Section 172 of the Internal Revenue Code? A. Yes, I am.

Stephen I. Weiss—for Debtor—Cross

Q. Are you familiar with Section 172 of the Internal Revenue Code pertaining to carry-backs and to carry-overs?

A. I believe so, yes.

Q. I read to you Section 172, Subdivision 2, of the Internal Revenue Code, which states, "Amount of carry-back and carry-overs. The entire amount of the net operating loss for any taxable year shall be carried to the earliest of the taxable years to which such loss may be carried."

Are you familiar with that provision? A. Yes, I am.

Q. Are you also familiar with the Administrative Code of the City of New York pertaining to the general corporation tax? A. Somewhat, yes.

Q. I call to your attention, and I ask the Court to take judicial notice of, the Administrative Code of the City of New York, Section R-46-2.0 (8) (B)—

Mr. Mann: (Interposing) If Your Honor please, I am going to object to this. The purpose is to elicit facts and not law from a witness. We did not qualify him as an expert in foreign law.

The law is what the law is, and whether this witness knows or does not know what the law is, is immaterial. I cannot see the materiality of asking a witness whether he is familiar with the Internal Revenue Code or with the City Charter, if Your Honor pleases.

Mr. Gingold: Your Honor, this witness is an accountant—

The Court: (Interposing) Objection overruled.

Q. The section I have just cited to you reads as follows, Mr. Weiss: "Such deduction which pertains to the net

Stephen I. Weiss—for Debtor—Cross

operating losses shall not include any net operating loss sustained during any taxable year in which the taxpayer was not subject to the tax imposed by this part."

Are you familiar with that, Mr. Weiss? A. Yes, I am.

Q. Do you know when that section of the Administrative Code was effective? A. Yes, on January 1, 1966.

Q. Now, going over to the tax returns which you filed in behalf of this Debtor, Mr. Weiss—

Mr. Mann: (Interposing) Which returns are we referring to now, since there are two of them in evidence?

Q. Yes. Referring to the 1967-1968 fiscal year United States Corporation income tax return, Mr. Weiss, can you tell me by looking at it, what was the earliest carry-over year that was applied to the net operating loss deduction (handing papers to the witness)? A. It was 1963.

Q. And is that the year when you applied your net operating loss deduction to this tax return? A. That is one of the years.

Q. That was the earliest year, was it not? A. Yes, it was.

Q. All right. Now, I show you Claimant's Exhibit A in evidence, which is the City of New York general corporation tax report, and I ask you can you tell me from this report what was the net operating loss year of the carry-over period that you applied (handing papers to the witness)? A. No, I could not tell what year it was from this.

Q. Could you tell us why you can't tell us that, Mr. Weiss?

A. Because no year is specified. I used as an operating

Stephen I. Weiss—for Debtor—Cross

loss deduction \$282,000.00 and some odd out of a total pool as I recall it of \$1,800,000.00.

Q. Was that an arbitrary figure that you applied, Mr. Weiss? A. No. It equaled the income on the federal tax return.

Q. It equaled the income on the federal tax return? A. The amount of the loss deduction that I showed on the city return was equal to the amount of income before the application of the loss deduction on the federal return.

Q. And what was your authority for doing that?

Mr. Mann: Your Honor, I am going to object to that.

The Court: Objection overruled.

A. As I recall it, and this is from my memory, Mr. Gingold, it was because I recall that the instructions said something like the amount of net operating loss deduction on the city return could not exceed the amount applied on the federal return, or something to that effect or some words like that.

Q. Is it your testimony that you are not sure why you applied that figure on the city return, Mr. Weiss? A. No. I am saying that that is to the best of my memory, that that is why I picked that particular figure.

Q. Well, knowing now what the provisions are of Section 172 of the Internal Revenue Code, and knowing now what the provisions are of the Administrative Code of the City of New York, will you say that you made a proper net operating loss deduction in the City return?

Mr. Mann: I object to the form of the question, if Your Honor pleases.

Stephen I. Weiss—for Debtor—Redirect

The Court: Objection overruled. Do you understand the question, Mr. Witness?

The Witness: Yes, Your Honor; I do.

The Court: The objection is overruled. You may answer the question.

A. I would say that I did not make a proper application of it.

Mr. Gingold: Thank you. Then, I have no further questions of this witness, if Your Honor pleases.

Redirect Examination by Mr. Mann:

Q. Now, Mr. Weiss, with your knowledge of the law today would you file an amended return for the year here in question? A. Yes, I would.

Q. And can you tell me what you base that opinion on?

Mr. Gingold: I am going to object to that, if Your Honor pleases. He is asking this witness for an opinion, I believe.

Mr. Mann: Your Honor, that is exactly what this counsel did with this witness.

The Court: Objection overruled. This is all opinion. It is all opinion testimony.

A. Well, I would file an amended return correcting the amount of the New York City operating loss deduction.

Q. And would you attempt to take advantage of any other loss deduction?

Stephen I. Weiss—for Debtor—Redirect

Mr. Gingold: I object to that, if Your Honor pleases. I do not think that is relevant to this proceeding.

The Court: Objection sustained as to form.

Q. Would you include in your return, in your amended return, any losses sustained by this corporation subsequent to the fiscal year ending in 1968, Mr. Weiss?

Mr. Gingold: I am going to object to that, if Your Honor pleases, because that has no bearing on this case at all.

Mr. Mann: It goes to the very heart of this case, if Your Honor please. It goes to the issue of what is a proper deduction under the law as it is, under the law as it exists.

It is our contention that not only can we take losses prior to the law, but that we have a carry-back for two years. I would say that under those circumstances had the witness prepared an amended return, he would have taken advantage of those facts, but we say that this is not a carry-back situation, if Your Honor pleases.

The Court: Why is it not a carry-back situation, Counselor?

Mr. Mann: Because he carried it forward from 1963 to 1968, Your Honor. Under the carry-back situation he can only carry-back three years beyond the first loss year.

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Decision of Bankruptcy Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Bankruptcy No. 70-B-1085

In the Matter of

AVIEN, INC.,

Debtor.

B e f o r e :

HONORABLE C. ALBERT PARENTE,

Bankruptcy Judge.

A p p e a r a n c e s :

LEVIN & WEINTRAUB, Esqs.

Attorneys for the Debtor

225 Broadway

New York, N.Y. 10007

By:

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of Counsel

NORMAN REDLICH, Esq.,

Corporation Counsel

of the City of New York

By:

MURRAY GINGOLD, Esq.,

Assistant Corporation Counsel

Decision of Bankruptcy Judge

The case at bar poses an issue clothed in the esoteric garments of net operating loss carrybacks and carryovers pursuant to the provisions of the Administrative Code of the City of New York apposite with the context of the provisions of the United States Internal Revenue Code.

The party litigants executed the following stipulation of facts:

1. On December 24, 1970 the debtor filed its petition for an arrangement under Chapter XI of the Bankruptcy Act and thereafter was continued in the operation of its business.

2. Debtor's respective United States Corporation Tax Returns showed taxable incomes (losses) as follows:

Fiscal year ending	Taxable income (loss)
June 30, 1963	\$ (762,423.73)
June 27, 1965	(156,856.34)
July 3, 1966	(993,529.48)
June 30, 1968	282,598.52

3. Debtor's City of New York General Corporation Tax Report for the Fiscal Year ending June 30, 1968 showed a net income of \$286,969.82 before net operating loss. Debtor's Federal Tax Return for the same tax year showed a net operating loss deduction of \$1,893,063.73 comprised of the following carry-forward losses:

For year ending 6/30/63	\$742,677.94
For year ending 6/30/65	\$156,856.34
From year ended 6/30/66	\$993,529.48

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4. On March 22, 1971 the City of New York ("City") filed estimated Claim No. 105 in this proceeding for the amount of \$2,530.00, computed as follows:

Commercial Rent	\$1,100.00
General Corporation Tax	1,100.00
Withholding Tax	330.00
	<hr/>
Total	\$2,530.00
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5. On May 26, 1961 the City filed first amended Claim No. 138 in this proceeding for the amount of \$4,000.00, computed as follows:

Commercial Rent	\$1,100.00
General Corporation Tax	1,100.00
Withholding Tax	1,800.00
	<hr/>
Total	\$4,000.00
	<hr/>

6. In June, 1973, the City audited debtor's books and records from January, 1966, through December 24, 1970, with regard to the debtor's tax liability to the City of New York.

7. On August 20, 1973, after the completion of a field audit by the City, the City filed a second amended Claim No. 195 in this proceeding in the amount of \$19,567.16, computed as follows:

Decision of Bankruptcy Judge

Commercial Rent	\$ 29.86
General Corporation Tax	17,789.32
Withholding Tax	1,747.98
	<hr/>
Total	\$19,567.16
	<hr/>

8. The portion of Claim No. 195 representing General Corporation Tax is for an amount which allegedly accrued in the fiscal year ending June 30, 1968 (together with interest and penalties of \$2,018.50) as a result of the disallowance of the loss carry-forward.

9. The debtor does not dispute its liability as set forth above for commercial rent, tax and withholding taxes.

Constant with paragraph 9 of the foregoing stipulation, the debtor concedes liability for the commercial rent and withholding taxes; thus the basic question to be resolved pertains to whether the City's Claim No. 195, representing general corporation tax for the year 1968 in the sum of \$17,789.32, should be allowed as a valid claim.

In supplement to the stipulation, the record discloses that the debtor in computing its United States corporation income tax return for the fiscal year July 3, 1967 to June 30, 1968 listed the sum of \$1,893,063.78 as a net operating loss. Said amount was culled by the taxpayer combining its net operating losses for the fiscal years following:

June 30, 1963	\$ 742,677.96
June 30, 1965	156,856.34
June 30, 1966	993,529.48
	<hr/>
for a composite total of	\$1,893,063.78
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Decision of Bankruptcy Judge

In addition to the above, the debtor incurred losses subsequent to the tax year 1968, viz.:

For the year ending June 29, 1969	\$165,427.60
For the year ending June 28, 1970	\$337,177.85

In essence, the debtor contends that no general corporation tax is due the claimant premised on the concept that the losses it sustained for the periods January 1, 1966 through June 30, 1966, and/or the losses for the fiscal years 1969 and 1970, offset any income earned for the fiscal year 1968.

The claimant, the City of New York, in diametric posture, asserts that the debtor's income is subject to tax posited upon the precept that a net operation loss deduction perforce be the "same as" the net operating loss deduction taken on the federal return. The phrase "same as" is construed by the City as absolute and inexorable interdicting any sequential or quantum deviation.

Provisions of the Internal Revenue Code and the Administrative Code of the City of New York appertaining follow in pertinent part:

Title R of Chapter 46 of the New York City Administrative Code, effective January 1, 1966, is the authority for the City Business Tax. Section 2.0 (8)(f) provides as follows:

"A net operating loss deduction shall be the same as the net operating loss deduction allowed under section one hundred seventy-two of the internal revenue code or which would have been allowed if the taxpayer had

Decision of Bankruptcy Judge

not made an election under subchapters of chapter one of the internal revenue code, except that . . . (2) such deductions shall not include any net operating loss sustained during any taxable year in which the taxpayer was not subject to the tax imposed by this part, and (3) such deduction shall not exceed the deduction for the taxable year allowable under section one hundred seventy-two of the internal revenue code . . .”

Section 172 of the Internal Revenue Code, to which reference is made above, provides as follows:

(a) There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year. For purposes of this subtitle, the term “net operating loss deduction” means the deduction allowed by this subsection.

(b) Net Operating Loss Carrybacks and Carryovers—

(1) Years to which loss may be carried—(A) (i) . . . a net operating loss for any taxable year ending after December 31, 1957, shall be a net operating loss carryback to each of the three taxable years preceding the taxable year of such loss . . .

(B) Except as provided in subparagraphs (C), (D) and (E), a net operating loss for any taxable year ending after December 31, 1955, shall be a net operating loss carryover to each of the

Decision of Bankruptcy Judge

five taxable years following the taxable year of such loss."

Adverting to the City's position, an analytical probe thereof elicits a negative three-pronged conjunctive premise in the essence following:

1) That the taxpayer, pursuant to § 172 of the Internal Revenue Code, was mandated to carry over its net operating loss for the year 1963 as the earliest carryover year.

2) That § R 46-2.0 (8) (a) of the Administrative Code of the City of New York exacts an imperative anchored to the concept that a net operating loss deduction be the same as the net operating loss deduction allowed under Section 172 of the Internal Revenue Code.

3) That § R 46-2.0 (8) (f) by its terms and provisions prohibits carryover losses sustained prior to the effective date of such statute, viz., 1966.

Patently, the City's strict construction of the foregoing statutes places the debtor on the horns of a dilemma and to put it in the vernacular—"the debtor is damned if he does and damned if he doesn't". Adoption of the City's narrow construction is tantamount to recognition of draconian law whereby the debtor is enmeshed by a trap of language and proffered an impotent remedy. Sanction of such viewpoint could conceivably bar carryover of tax losses for an optimum period of five years.

Decision of Bankruptcy Judge

The paucity of legislative history and authoritative case precedent suggests that the issue correlates to one of first impression in bankruptcy jurisprudence.

Consonant with the foregoing, the City seeks succor from an analogous statute, viz., New York State Corporation Franchise Tax, § 208.9 (a), Article 9a of New York State Law. The decisions rendered thereunder by the State Tax Commission are interposed in support of its position. On the other hand, and in contraposition, the debtor cites the governor's proclamation expressing a liberal policy with reference to the allowance carryback and carryforward of net operating losses.

The above unofficial authorities lack significant force or weight of sufficient input as justification for a binding precedent. Thus, the Court is pressed to elicit a reasonable enucleation of the instant statutory conflict and ambiguity.

Responsive thereto, the Court finds the phrase "same as" is not cast in concrete as advocated by the City. The language of the statute connotes a range of limitation in lieu of a complete bar or exclusion of the right to offset earned income by carryback or carryover of losses.

The losses incurred by the debtor are, in the Court's view, the "same as" in component part if not identical to the tax reports filed with Internal Revenue. The City's contention that both the reporting period and loss deductions be the same is rejected . . . in the matter of *Warren-Connolly Co., Inc.*, Petitioner, v. *State Tax Commission*, 42 A.D. 2d 369.

The dominant thrust and the key to the Court's opinion turns upon reasonable interpretation of the legislative in-

Decision of Bankruptcy Judge

tent in contrast to blind adherence to the language of a statute . . . in the matter of *American Can Company*, Petitioner, v. *State Tax Commission of the State of New York*, Respondent, S.Ct., App. Div., 3rd Dept., June 24, 1971, the Court held as follows:

"When construing a statute the courts give great weight to the construction given it by the officers who are charged with the duties of enforcement (*Matter of Lawrence-Cedarhurst Bank*, 247 App. Div. 528, 288 N.Y.S. 301, affd. 272 N.Y. 646, 5 N.E. 2d 374). The language as construed should not 'be at war with the plainest principles of reason and justice'. (*People ex rel. Burhans v. City of New York*, 198 N.Y. 439, 448, 92 N.E. 18, 20.)"

Consonant with the above, the Court finds it inconceivable that the legislature intended to circumscribe and exact a forfeiture of carryover or carryback losses.

Absent express statutory prohibition, the Court concludes that the debtor is entitled to carryback and carryforward net operating losses for the years 1966, 1969 and 1970, offsetting the 1968 profit.

Accordingly, the claim of the City of New York is expunged as arbitrary and contrary to law.

SETTLE ORDER.

C. ALBERT PARENTE
Bankruptcy Judge

Dated: Jamaica, N.Y.
June 18, 1974

Order of Bankruptcy Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Bankruptcy No. 70 B 1085

In the Matter

of

AVIEN, INC.,

Debtor.

ORDER REDUCING CLAIM #195

At Jamaica, New York, in said District on the 2nd day of July 1, 1974.

The debtor having objected to the claim of the City of New York (Claim No. 195) filed in the sum of \$19,567.16 and said objection having come on to be tried on February 5, 1974 and February 19, 1974.

Now, upon reading the notice of motion objecting to claim No. 195, and upon the Stipulation of Facts dated December 18, 1973, and the minutes taken before me in open court and the court having rendered a decision dated June 18, 1974, it is

Now, on motion of Levin & Weintraub, attorneys for the debtor,

ORDERED, that Claim No. 195 be and the same hereby is reduced to \$1,777.84.

C. ALBERT PARENTE
Bankruptcy Judge

Opinion and Order by Neaher, D.J.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

70 B 1085

In the Matter

of

AVIEN, INC.,

Debtor.

OPINION

APPEARANCES :

W. BERNARD RICHLAND, Esq.

Corporation Counsel of the City of New York

Attorney for Appellant City of New York

By MURRAY GINGOLD, Esq.

SAMUEL J. WARMS, Esq. and

RAYMOND HERZOG, Esq., of Counsel

LEVIN & WEINTRAUB, Esqs.

Attorneys for Appellee Avien, Inc.

By ELIAS MANN, Esq.

MARTIN I. KLEIN, Esq.

NEAHER, *District Judge.*

This is an appeal by the City of New York ("the City") from a decision of the bankruptcy judge expunging its claim against the debtor for unpaid corporation taxes in

Opinion and Order by Neaher, D.J.

the amount of \$17,789.32. Decision of the appeal turns upon the correct construction to be placed on the carryforward and carryback loss provisions of the City's General Corporation Tax, Administrative Code of the City of New York, §R46-2.0(8)(f).

The pertinent facts are not in dispute. On December 24, 1970, the debtor ("Avien") filed a petition for an arrangement under Chapter XI of the Bankruptcy Act and thereafter was continued in the operation of its business. The City, in June 1973, conducted an audit of Avien's books and records for the period from January 1966 through December 24, 1970, with respect to its tax liability to the City. After completion of the audit, the City filed an amended claim in the Chapter XI proceeding which included an item of \$17,789.32 for unpaid general corporation tax allegedly accruing in Avien's fiscal year ending June 30, 1968 (together with interest and penalties of \$2,018.50).

There is no question that the City's foregoing tax claim is based upon Avien's City General Corporation Tax Report for fiscal 1968, which showed a net income of \$286,959.82 *before* net operating loss. Despite that alleged "income", Avien paid no federal taxes in that year because its income was more than offset by the following carryforward losses reported on its federal tax return:

<i>Fiscal Year Ending</i>	<i>Taxable Income (Loss)</i>
June 30, 1963	(\$762,423.73)
June 27, 1965	(\$156,856.34)
July 3, 1966	(\$993,529.48)
June 30, 1968	\$282,598.52 ¹

¹ As a result of some slight modifications, Avien's reported income for City tax purposes for fiscal 1968 was \$286,969.82.

Opinion and Order by Neaher, D.J.

Avien also reported losses on its federal returns for fiscal 1969 and 1970 of \$165,427.60 and \$337,177.85 respectively.

In urging the validity of its claim despite Avien's losses, the City contends, in effect, that the carryforward and carryback loss provisions of the City's Administrative Code require a taxpayer to use as an offset against income only the *identical* loss he has used as an offset on the federal return. The City further contends that if other provisions of the City's tax law prohibit the use of that loss for City tax purposes, the taxpayer may not substitute as a deduction a loss from a different year.

The bankruptcy judge concluded that, in the absence of express legislative history to the contrary, the implicit legislative intent in adopting a carryforward and carryback loss provision, *i.e.*, to allow an averaging of income over a number of years, would best be effectuated by not binding a taxpayer to the loss used on his federal return if that loss did not qualify for City tax purposes. This court agrees.

I.

The City's tax on corporate net income is imposed under Title R of Chapter 46 of the New York City Administrative Code §2.0(8), effective January 1, 1966, which provides in pertinent part:

"'Entire net income' means net income from all sources which shall be the same as the taxpayer's federal taxable income"

Subdivision (f) of §2.0(8) provides in part:

"A net operating loss deduction shall be allowed which shall be the same as the net operating loss deduction

Opinion and Order by Neaher, D.J.

allowed under section one hundred seventy-two of the internal revenue code or which would have been allowed if the taxpayer had not made an election under subchapter s of chapter one of the internal revenue code, except that . . . (2) such deductions shall not include any net operating loss sustained during any taxable year in which the taxpayer was not subject to the tax imposed by this part, and (3) such deduction shall not exceed the deduction for the taxable year allowable under section one hundred seventy-two of the internal revenue code”

The City’s position is that a city taxpayer, pursuant to §2.0(8), must report taxable income for City tax purposes which is “the same as” the taxable income reported for federal tax purposes. The latter is determined in accordance with §63(a) of the Internal Revenue Code of 1954 (“the Code”), which provides in part:

“‘[T]axable income’ means gross income, minus the deductions allowed by this chapter”

One of the allowed deductions is that provided for in §172 of the Code.² The City, therefore, would have the court

² Section 172 of the Code provides in part:

“(a) Deduction allowed.—There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year. For purposes of this subtitle, the term ‘net operating loss deduction’ means the deduction allowed by this subsection.

“(b) Net operating loss carrybacks and carryovers.—

“(1) Years to which loss may be carried.—

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conclude that the same carryover loss used as an offset for federal tax purposes must be used as an offset for City tax purposes, so that taxable income for City tax purposes will be "the same as" taxable income for federal tax purposes in both final amount and identity of component deductions.

The City further contends that under §172 a taxpayer *must* first apply the earliest loss as a carryforward before other losses may be used.

Applying the foregoing contentions here, the City's position is that in computing Avien's 1968 taxable income for federal tax purposes, the 1963 loss must be applied first and since that loss is sufficient to completely offset 1968 income, no other loss year, *i.e.*, 1965, 1966, 1969 or 1970, need be used. For City tax purposes, however, the 1963 loss is disqualified under §2.0(8)(f)(2) because the general cor-

"(A)(i) Except as provided in clause (ii) and in subparagraph (D), a net operating loss for any taxable year ending after December 31, 1957, shall be a net operating loss carryback to each of the 3 taxable years preceding the taxable year of such loss.

* * * * *

"(B) Except as provided in subparagraphs (C) and (D), a net operating loss for any taxable year ending after December 31, 1955, shall be a net operating loss carryover to each of the 5 taxable years following the taxable year of such loss.

* * * * *

"(2) Amount of carrybacks and carryovers.—Except as provided in subsections (i) and (j), the entire amount of the net operating loss for any taxable year (hereinafter in this section referred to as the 'loss year') shall be carried to the earliest of the taxable years to which (by reason of paragraph (1)) such loss may be carried. The portion of such loss which shall be carried to each of the other taxable years shall be the excess, if any, of the amount of such loss over the sum of the taxable income for each of the prior taxable years to which such loss may be carried."

Opinion and Order by Neaher, D.J.

poration tax was not effective until January 1, 1966. The City therefore concludes that Avien has taxable income for fiscal 1968 for City tax purposes, with no eligible loss deductions to offset it.

Avien concedes that its 1963, 1965 and pre-January 1, 1966, losses are ineligible as carryforwards for City tax purposes. Avien maintains, however, that it should be permitted to offset against 1968 income, for City tax purposes, its post-January 1, 1966 losses as a carryforward, as well as 1969 and 1970 losses as carrybacks.

Concededly, the legislature could, if it so desired, deny a City taxpayer the benefit of a carryover or carryback loss deduction unless the loss sought to be used as a deduction from City income was the identical loss used as a deduction from federal income. The question here is whether the legislature so intended.

Both sides concede the absence of clarifying legislative history relating to §2.0(8) of the City tax law. The City argues that the explicit language "the same as" must be construed to mean that a taxpayer's City return is to be identical with his federal return. Otherwise, it argues, there is nothing to prevent a taxpayer from using a different method of depreciation on his City return. The City sees further support for its position in the specific deviation permitted by the City tax law in the case of a subchapter S corporation and the absence of any specific provision permitting substitution of other carryforward and carryback losses when those used in computing federal taxable income are ineligible for City tax purposes.

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On the broad question of legislative intent, the City points out that the basis of the City tax is conformity with the federal tax. Conformity is desirable, it argues, in that it enables the City to conduct "desk audits," leaving the bulk of the field auditing to the federal government, which is better equipped to conduct large scale audits. Without such conformity in the instant case, for example, the City would be required to undertake extensive audits which would not otherwise be necessary. This will happen, the City argues, because Avien's only possible tax liability for federal tax purposes relates to income earned in fiscal 1968. Since that income is completely offset for federal tax purposes by 1963 losses, the federal government has no reason to, and consequently will not, audit Avien's returns for 1966, 1969 or 1970, the years in which the losses occurred which are now sought to be used to offset Avien's 1968 income for City tax purposes.³

However, convenient conformity may be for administration, in construing legislation the court is bound to give effect to its primary purpose, even if to do so the court must depart from a literal reading of the legislation. *Le Drugstore Etats Unis, Inc. v. New York State Board of Pharmacy*, 33 N.Y.2d 298, 352 N.Y.S.2d 188 (1973); *Abood v. Hospital Ambulance Service, Inc.*, 30 N.Y.2d 295, 332 N.Y.S.2d 877 (1972); *Hogan v. Culkin*, 18 N.Y.2d 330, 274 N.Y.S.2d 881 (1966); *Petterson v. Daystrom Corporation*, 17 N.Y.2d 39, 268 N.Y.S.2d 1 (1966). Manifestly, the intention of the legislature in providing for carryforward and carryback loss deductions was to permit a City taxpayer to pay tax on an amount which more accurately reflects his true economic

³ Appellant's Brief at 20-21.

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gain over a period of years. Such a provision might, presumably, be a factor in inducing a corporation to relocate or remain in the City.

To adopt the City's construction of §2.0(8) would undermine this legislative intent. This is exemplified by Avien's situation here. Avien's true City income after January 1, 1966 consists of both losses and profits, a situation clearly within the purview of the carryforward and carryback loss provisions of the City tax law. Yet, according to the City, despite post-1966 losses, Avien must, nonetheless, pay City tax on its 1968 income because for federal tax purposes it used pre-January 1, 1966 losses.⁴

Rather, it seems clear the legislature intended that a City taxpayer should be given the same type of benefit allowed federal taxpayers, *i.e.*, an averaging of income over a period of years during which the tax was in effect. The reference in §2.0(8) to §172 of the Code is for general guidance and is not so inflexible as to require a non-intended result.

The court does agree with the City that the computation of City taxable income requires, at least initially, the use of the figures *reported* on the federal return. Thus, if a particular method of depreciation is employed in the calculation of federal taxable income, that same method (and consequently the same figure) must be used in computing City

⁴ Similarly, a corporation which at present is located out of the City and has incurred an operating loss in its last fiscal year would, if it also sustained a loss in its first year in the City, risks having to pay City tax on income earned in its second fiscal year in the City because it would have to use the pre-City loss as an offset on its federal return and consequently, according to the City, also on its City return. This situation would certainly act as a disincentive to a corporation contemplating a move to the City and could hardly have been intended by the drafters of the City tax law.

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taxable income. Similarly, the same loss figures *reported* on the federal return must be *reported* on the City return, no variances other than those specifically provided for in R46-2.0(8)(a)-(i) are permitted.

The mere fact, however, that the *reported* figures must be the same does not *ipso facto* mandate that their *application* be the same. Section 2.0(8)(f) reads, "A net operating loss deduction shall be *allowed* which shall be the same as the net operating loss deduction *allowed* under section one hundred seventy-two" (Emphasis supplied.) If for some reason a taxpayer chose not to apply a reported loss from a qualifying year as a deduction on his federal return there is no reason why he would not be permitted to apply a different loss from another qualifying year as a deduction under §172. *Brandon v. United States*, 204 F. Supp. 912 (N.D. Ga. 1962); *contra*, Rev. Ruling 218, 53-2 Cum. Bull. 176. Consequently, Avien's post-January 1, 1966 and 1969 and 1970 losses are losses which are "allowed" under §172 and consequently may be used as deductions against City income under §2.0(8)(f).⁵ If the legislature had intended the strange result urged by the City, it would have used the phrase "actually taken under section 172" instead of the phrase "allowed under section one hundred seventy-two", which it did use.

Furthermore, if in fact §2.0(8) means that the identical loss used on the federal return must be used on the City return, the language of §2.0(8)(f)(3), *i.e.*, "such deduction shall not exceed the deduction for the taxable year allow-

⁵ During oral argument the City indicated that it would not even permit Avien to amend its 1968 federal return to waive 1963, 1965 and pre-January 1, 1966 losses and substitute therefor post-January 1, 1966, 1969 and 1970 losses.

Opinion and Order by Neaher, D.J.

able under section one hundred seventy-two . . .", would be superfluous. If the identical loss must be used, obviously it could not be greater than itself.

The City's reliance on the subchapter S exception of §2.0(8)(f), as supportive of the proposition that the only intended deviations from reported federal income are those specifically enumerated, is misplaced. Under 26 U.S.C. §1373, taxable income of a subchapter S corporation is calculated without regard to §172 deductions. The obvious reason for that is that net income or loss of those corporations is immediately passed through to the stockholders and appears on their individual returns. There are, therefore, no corporate losses to be carried forward or back. The correlative provision of the federal carryforward and carryback loss section, §172(h), similarly provides that subchapter S losses are to be disregarded for the purpose of that section. If, therefore, §2.0(8)(f) did not specifically provide for the subchapter S exception, a subchapter S corporation would not be entitled to carryback or carryforward losses on the City return since such losses are specifically not "allowed under section one hundred seventy-two." As indicated above, post-January 1, 1966 losses are allowed under §172 even if there are sufficient pre-January 1, 1966 losses and there is therefore no need for a specific exception to that effect in §2.0(8)(f).

Nor will the legislature's obvious intention to conform the City tax law to the federal law in order to facilitate the auditing procedure be frustrated by this holding. As presently constituted the City return (line 9, schedule B) asks merely for a dollar figure representing the "New York City net operating loss deduction." The return seeks no information as to the identity of the loss year or years

Opinion and Order by Neaher, D.J.

from which this figure is derived. Presumably if the City auditors want to know how a taxpayer arrived at the reported figure, they will request copies of the taxpayer's federal returns. A brief review of the losses reported on the applicable federal returns will reveal if the taxpayer is entitled to the loss deduction claimed on the City return.⁶

Similarly, this holding does not interfere with the legislature's implicit desire that the initial burden of ascertaining the accuracy of the reported losses remain on the federal government. The City's argument that the federal government has no incentive to audit years in which losses, which are not used as carrybacks, are reported strikes the court as disingenuous. Without auditing those years, the federal government does not know whether in fact the taxpayer properly has losses or profits for those years.

Thus to adopt the construction urged by the City would do violence to a clear legislative intent to confer upon City taxpayers the benefit of an income averaging system while accomplishing no useful purpose with respect to the administration of the tax.

II.

As a secondary argument the City maintains that the burden of proving its entitlement to deductions for losses incurred in the periods of January 1, 1966 to June 30, 1966 and fiscal 1969 and 1970 is on Avien and that Avien did not satisfy that burden in the bankruptcy court. In that

⁶ Section 46-5.0(3) requires a City taxpayer to notify the City taxing authority of any change made by federal taxing officials in the taxpayer's federal return.

Opinion and Order by Neaher, D.J.

court Avien introduced into evidence copies of its 1969 and 1970 federal tax returns. Additionally, Avien's comptroller testified that a cursory examination of Avien's books and records for fiscal 1966 revealed that \$125,000 (with a 10-20% margin of error) of Avien's total loss for that year was incurred after January 1, 1966. The City's position is that in order to sustain its burden of proof, Avien was obliged to produce its books, records and supporting documents relevant to the periods in question. Avien having failed to do so, the City urges that the findings of the bankruptcy judge expunging its claim for general corporation tax should be reversed as clearly erroneous.

While the burden of proof with respect to deductions claimed is normally on the taxpayer, Administrative Code, City of New York §R46-70.0(5); *People ex rel. Kohlman & Co. v. Law*, 239 N.Y. 346 (1925), that is not the case in bankruptcy proceedings where the burden of establishing its claim rests on the government. *In re Gorgeous Blouse Co., Inc.*, 106 F. Supp. 465 (S.D.N.Y. 1952). The government is aided, however, by a strong presumption which arises in its favor by the filing of a sworn proof of claim; a *prima facie* case is established and the burden of going forward with rebutting evidence is on the debtor. *In re Garfield Bag & Stationery Co., Inc.*, 42 F. Supp. 708, 710-11 (S.D.N.Y. 1941); *In re Bradley*, 16 F.2d 301, 302 (S.D.N.Y. 1926). See also Bankruptcy Rule 301(b). The ultimate burden of persuasion remains on the government. *In re Gorgeous Blouse Co., Inc.*, *supra*, 106 F. Supp. at 465.

Thus, the City here established its *prima facie* case when it filed its sworn proof of claim. The question is whether

Opinion and Order by Neuhar, D.J.

Avien sufficiently rebutted the presumption arising from that filing so as to shift the burden of going forward back to the City.

By its own admission, the City relies heavily, almost exclusively, on the figures reported on a taxpayer's federal return, and their accuracy as guaranteed by federal audits, in computing the taxpayer's City tax liability. It would thus seem manifestly unfair to hold that in a bankruptcy proceeding the debtor must offer more than the City normally relies on itself.

Moreover, if the City questioned the accuracy of the figures reported on the federal returns the burden of at least so indicating was on the City, particularly in view of the fact that the City itself audited Avien's books and records for the periods in question. Avien's comptroller testified in the bankruptcy court and could have been cross-examined as to the accuracy of the 1969 and 1970 federal returns. The City could not properly remain silent below and raise now for the first time an unsupported challenge to Avien's 1969 and 1970 federal returns. The rapid administration of debtor's affairs would, indeed, be ill served by sanctioning such procedure. Consequently, the court holds that Avien sufficiently rebutted the City's presumption by offering into evidence copies of its 1969 and 1970 federal tax returns, which indicated losses of \$165,427.60 and \$337,177.85.⁷

⁷ Since the 1969 and 1970 losses are more than sufficient to offset Avien's 1968 income of \$282,598.52 it is not necessary to decide the sufficiency of the proof offered with respect to the portion of Avien's 1966 loss occurring after January 1, 1966.

Opinion and Order by Neaher, D.J.

Accordingly, the decision of the bankruptcy judge expunging the City's claim for general corporation tax is affirmed.

SO ORDERED.

EDWARD R. NEAHER
U.S.D.J.

Dated: Brooklyn, New York
March 10, 1975

Debtor's Exhibit 1 in Evidence

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

In Proceedings for an Arrangement No. 70-B-1085

 IN THE MATTER

OF

AVIEN, INC.,

Debtor.

 STIPULATION OF FACTS

IT IS HEREBY STIPULATED by the attorneys for the respective parties that the following are the undisputed facts in connection with the debtor's motion to reduce Claim No. 195 of the City of New York:

1. On December 24, 1970 the debtor filed its petition for an arrangement under Chapter XI of the Bankruptcy Act and thereafter was continued in the operation of its business.

2. Debtor's respective United States Corporation Tax Returns showed taxable incomes (losses) as follows:

Fiscal year ending	Taxable income (loss)
June 30, 1963	\$ (762,423.73)
June 27, 1965	(156,856.34)
July 3, 1966	(993,529.48)
June 30, 1968	282,598.52

Debtor's Exhibit 1 in Evidence

3. Debtor's City of New York General Corporation Tax Report for the Fiscal Year ending June 30, 1968 showed a net income of \$286,969.82 before net operating loss. Debtor's Federal Tax Return for the same tax year showed a net operating loss deduction of \$1,893,063.73 comprised of the following carry-forward losses:

For year ending 6/30/63	\$742,677.94
For year ending 6/30/65	156,856.34
From year ended 6/30/66	993,529.48

4. On March 22, 1971, the City of New York ("City") filed estimated Claim No. 105 in this proceeding for the amount of \$2,530.00, computed as follows:

Commercial Rent	\$1,100.00
General Corporation Tax	1,100.00
Withholding Tax	330.00
<hr/>	
Total:	2,530.00

5. On May 26, 1961, The City filed first amended Claim No. 138 in this proceeding for the amount of \$4,000.00, computed as follows:

Commercial Rent	\$1,100.00
General Corporation Tax	1,100.00
Withholding Tax	1,800.00
<hr/>	
Total:	4,000.00

6. In June, 1973 the City audited debtor's books and records from January, 1966 through December 24, 1970 with regard to the debtor's tax liability to the City of New York.

Debtor's Exhibit 1 in Evidence

7. On August 20, 1973 after the completion of a field audit by the City the City filed a second amended Claim No. 195 in this proceeding in the amount of \$19,567.16, computed as follows:

Commercial Rent	\$ 29.86
General Corporation Tax	17,789.32
Withholding Tax	1,747.98
	<hr/>
Total:	\$19,567.16

8. The portion of Claim No. 195 representing General Corporation Tax is for an amount which allegedly accrued in the fiscal year ending June 30, 1968 (together with interest and penalties of \$2,018.50) as a result of the disallowance of the loss carry-forward.

9. The debtor does not dispute its liability as set forth above for commercial rent, tax and withholding taxes.

Dated: New York, New York
December 18, 1973

LEVIN & WEINTRAUB
Attorneys for Debtor

By: ELIAS MANN
A Partner

NORMAN REDLICH
*Corporation Counsel of the
City of New York*

By: MURRAY GINGOLD
Assistant Corporation Counsel

FORM

1120

U.S. Treasury Department
Internal Revenue Service

U.S. Corporation Income Tax Return

For calendar year 1968 or other taxable year beginning

July 1, 1968, ending June 30, 1969

(PLEASE TYPE OR PRINT)

1968

Check if a—
 A Sole proprietorship ☐ or partnership ☐ electing under section 1361 to be taxed as a corporation.
 B Consolidated return ☐
 C Personal Holding Co. ☐
 D Business Code No. (see page 7 of instructions.)

11-1718293 FOR JUN 30, 1969 DOLL
 AVIEN INC
 58 15 NORTHERN BLD
 WOODSIDE N Y 11377

E Employer Identification No.
11-1718293F County in which located
Queens

G Enter total assets from line 14, column (D), Schedule L (See instruction R)

\$3,382,791.07

IMPORTANT—All applicable lines and schedules must be filed in. If the lines on the schedules are not sufficient, see instruction N.

GROSS INCOME

1 Gross receipts or gross sales 1,635,275.67 Less: Returns and allowances 6,994.50 1,628,281.17
 2 Less: Cost of goods sold (Schedule A) and/or operations (attach schedule) 1,779,363.87
 3 Gross profit 148,917.30
 4 Dividends (Schedule C)
 5 Interest on obligations of the United States and U.S. instrumentalities 32,664.75
 6 Other interest
 7 Gross rents
 8 Gross royalties 215.00
 9 Net gains (losses)—(separate Schedule D) 17,924.04
 10 Other income (attach schedule) 100,721.09
 11 TOTAL income—Add lines 3 through 10 142,280.51

DEDUCTIONS

12 Compensation of officers (Schedule E)
 13 Salaries and wages (not deducted elsewhere)
 14 Repairs (do not include capital expenditures)
 15 Bad debts (Schedule F if reserve method is used)
 16 Rents
 17 Taxes (attach schedule)
 18 Interest 910.00
 19 Contributions (attach schedule—see instructions for limitation)
 20 Casualty or theft losses (attach schedule)
 21 Amortization (attach schedule)
 22 Depreciation (Schedule G)
 23 Depletion 7,946.83
 24 Advertising
 25 (a) Pension, profit-sharing, stock bonus, annuity plans (attach Form 2950)
 (b) Other employee benefit plans (see instructions)
 26 Other deductions (attach schedule) 332,207.94
 27 TOTAL deductions on lines 12 through 25 665,718.69
 28 Taxable income before net operating loss deduction and special deductions (line 11 less line 27) (165,127.60)
 29 Less: (a) Net operating loss deduction (see instructions—attach schedule) 1,150,385.82
 (b) Special deductions (Schedule I)
 30 Taxable income (line 28 less line 29) (1,315,513.42)

TAX

31 TOTAL TAX (Schedule J)
 32 Credits: (a) Tax deposited—Form 7004 application for extension (attach copy).
 (b) 1968 estimated tax payments (include 1967 overpayment allowed as a credit—do not include any "quick refund" of overpayment of 1968 estimated tax applied for on Form 4456).
 (c) Credit from regulated investment companies (attach Form 2439)
 (d) Credit for U.S. tax on nonhighway gas and tube oil (attach Form 4136)
 33 TAX DUE (line 31 less line 32). See instruction G for tax deposit system.
 34 OVERPAYMENT (line 32 less line 31).
 35 Enter amount of line 34 you want credited to 1969 estimated tax. Refunded

Under penalties of perjury, I declare that I have prepared this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. If prepared by a person other than the taxpayer, his declaration is based on all information of which he has any knowledge.

CORPORATE
SEAL6-11-77
Date

Signature of officer

Treasurer
Title

Date

Individual or partnership name

Address

650-16-80234-1

Debtor's Exhibit 2 in Evidence

70a

U.S. Corporation Income Tax Return
For calendar year 1970 or other taxable year beginning
June 30, 1969, 1970; ending June 28, 1970
(PLEASE TYPE OR PRINT)

1970

Check if a—

A Consolidated return ☐

B Personal Holding Co. ☐

C Business Code No. (See page 7 of instructions.)

Transfer address label from
cover and place it here

D Employer Identification No.

11-1718293

E County in which located

Queers

F Enter total assets from line 14, column (D), Schedule L (See instruction R)

\$ 3,219,318.41

IMPORTANT—Fill in all applicable lines and schedules. If the lines on the schedules are not sufficient, see instruction N.

GROSS INCOME	1	Gross receipts or gross sales	1,255,804.40	Less: Returns and allowances	5,521.96	
	2	Less: Cost of goods sold (Schedule A) and/or operations (attach schedule)				1,250,282.44
	3	Gross profit				1,097,366.83
	4	Dividends (Schedule C)				152,915.61
	5	Interest on obligations of the United States and U.S. instrumentalities				
	6	Other interest				54,852.11
	7	Gross rents				
	8	Gross royalties				
	9	Net gains (losses)—(separate Schedule D)				5,630.00
	10	Other income (attach schedule)				213,398.02
	11	TOTAL income—Add lines 3 through 10				132,659.50
DEDUCTIONS	12	Compensation of officers (Schedule E)				104,517.32
	13	Salaries and wages (not deducted elsewhere)				4,682.69
	14	Repairs (do not include capital expenditures)				
	15	Bad debts (Schedule F if reserve method is used)				
	16	Rents				17,857.31
	17	Taxes (attach schedule)				63,327.15
	18	Interest				100.00
	19	Contributions (not over 5% of line 23 adjusted per instructions—attach schedule)				3,571.32
	20	Amortization (attach schedule)				8,435.30
	21	Depreciation (Schedule G)				2,912.52
	22	Depletion				
	23	Advertising				
	24	Profit sharing, stock bonus, pension and annuity plans (see instructions)				
	25	Other employee benefit plans (see instructions)				212,182.69
	26	Other deductions (attach schedule)				550,575.87
	27	TOTAL deductions on lines 12 through 26				(337,177.85)
	28	Taxable income before net operating loss deduction and special deductions (line 11 less line 27)				1,215,813.42
	TAX	29	Less: (a) Net operating loss deduction (see instructions—attach schedule)			
(b) Special deductions (Schedule I)						(1,652,091.27)
30	Taxable income (line 28 less line 29)				-0-	
31	TOTAL TAX (Schedule J)					
TAX	32	Credits: (a) Tax paid (deposited) with Form 7004 application for extension (attach copy)				
	(b)	Estimated tax—Overpayment from 1969 allowed as a credit				
		1970 estimated tax payments (deposits)				
		Less refund of 1970 estimated tax applied for on Form 4466				
	(c)	Credit from regulated investment companies (attach Form 2439)				
	(d) U.S. tax on special fuels, nonhighway gas and lubricating oil (attach Form 4136)					
33	TAX DUE (line 31 less line 32). See instruction G for depository method of payment					
34	OVERPAYMENT (line 32 less line 31)					
35	Enter amount of line 34 you want: Credited to 1971 estimated tax <input type="checkbox"/> Refunded <input type="checkbox"/>					

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. If prepared by a person other than the taxpayer, his declaration is based on all information of which he has any knowledge.

CORPORATE
SEAL

11/24/71
Date

Signature of officer

TREAS
Title

Date

Individual or firm signature of preparer

Address

450-16-81195-1

Debtor's Exhibit 3 in Evidence

71a

FORM 1120

U.S. Treasury Department
Internal Revenue Service

U.S. Corporation Income Tax Return

For calendar year 1967 or other taxable year beginning
JULY 3, 1967, ending JUNE 30, 1968
(PLEASE TYPE OR PRINT)

1967

Check one—
A Sole proprietorship ☐ or
partnership ☐ electing under
section 1361 to be taxed as a
corporation.
B Consolidated return. ☐
C Personal Holding Co. ☐
D Business Code No. (see instr.)11-1718293
AVILE INC
58 15 NORTHERN BLD
WOODSIDE

1968 DO 11 06

N Y 11377

E Employer Identification No.
11-1718293F County in which located.
QUEENSG Enter total assets from line
14, column (B), Schedule L
(See instruction I)

\$ 2,220,421.59

372

IMPORTANT—All applicable lines and schedules must be filled in. If the lines on the schedules are not sufficient, see instruction N.

GROSS INCOME

1	Gross receipts or gross sales	7,111,664.75	Less: Returns and allowances	1,099,441.41	6,012,223.34
2	Less: Cost of goods sold (Schedule A) and/or operations (attach schedule)				640,207.11
3	Gross profit				765,673.91
4	Dividends (Schedule C)				
5	Interest on obligations of the United States and U.S. instrumentalities				
6	Other interest				8,065.93
7	Gross rents				
8	Gross royalties				
9	Net gains (losses)—(separate Schedule D)				6,315.29
10	Other income (attach schedule)				
11	TOTAL income—Add lines 3 through 10				780,075.10

DEDUCTIONS

12	Compensation of officers (Schedule E)				134,521.15
13	Salaries and wages (not deducted elsewhere)				69,119.25
14	Repairs (do not include capital expenditures)				4,825.04
15	Bad debts (Schedule F if reserve method is used)				1,509.32
16	Rents				13,470.81
17	Taxes (attach schedule)				13,158.64
18	Interest				5,690.31
19	Contributions (attach schedule—see instructions for limitation)				172.62
20	Casualty or theft losses (attach schedule)				
21	Amortization (attach schedule)				
22	Depreciation (Schedule G)				6,350.10
23	Depletion (attach schedule)				
24	Advertising				913.82
25	(a) Pension, profit-sharing, stock bonus, annuity plans (attach Form 2950)				13,910.00
	(b) Other employee benefit plans (see instructions)				
26	Other deductions (attach schedule)				234,312.80
27	TOTAL deductions on lines 12 through 26				497,476.53
28	Taxable income before net operating loss deduction and special deductions (line 11 less line 27)				282,598.57
29	Less: (a) Net operating loss deduction (see instructions—attach schedule)				(1,822,063.75)
	(b) Special deductions (Schedule I)				
30	Taxable income (line 28 less line 29)				(1,510,465.24)

TAX

31	TOTAL income tax (Schedule J)				-0-
32	Credits: (a) Tax deposited—Form 7004 application for extension (attach copy)				
	(b) 1967 estimated tax payments (include 1966 overpayment allowed as a credit)				
	(c) Credit from regulated investment companies (attach Form 2439)				
	(d) Credit for U.S. tax on nonhighway gas and lube oil (attach Form 4136)				
33	If tax (line 31) is larger than credits (line 32), the balance is TAX DUE. See instr. G for Tax Deposit System				
34	If tax (line 31) is less than credits (line 32) Enter the OVERPAYMENT here				
35	Enter amount of line 34 you want: Credited to 1968 estimated tax				
	Refunded				

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. If prepared by a person other than taxpayer, his declaration is based on all information of which he has any knowledge.

CORPORATE
SEAL

2-12-68

Date

Signature of officer

TREASURER

Title

Date

Individual or firm signature of preparer

Address

459-16-10822-1

Claimant's Exhibit B in Evidence

72a

PAGE 1 SCHEDULE 29a ITEM 29a

NET OPERATING LOSS DEDUCTION

1963 Loss	\$ 762,423.73
LESS: APPLIED TO 1967 PROFIT	<u>19,745.79</u>
	742,677.94
1965 Loss	156,856.34
1966 Loss	<u>993,529.48</u>
	<u>\$ 1,893,063.76</u>

73a
Claimant's Exhibit B in Evidence

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Carlos M. Rodriguez being duly sworn, says that on the 8 day of August 19 75, he served the annexed Appendix upon Julian V. Spencer Esq., the attorney for the Nat. Lehigh Trust herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 45 North 2nd Street in the Borough of East New York City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this

8 day of August 19 75

Carlos M. Rodriguez

WILLIAM H. GARAUDE

#24-1370769 EXD 3/30/77

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Charles M. Rodriguez being duly sworn, says that on the 8 day
of August, 1975, he served the annexed Appendix upon
Richard F. Weinbaum Esq., the attorney for the Debtor
herein by mailing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and
Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the
United States in said city directed to the said attorney at No. 225 W 4th in the
Borough of Manhattan, City of New York, being the address within the State theretofore designated by
him for that purpose.

Sworn to before me, this

day of August

1975

Charles M. Rodriguez